COMMERCIAL ARBITRATION AND THE LAW. By Julius Henry Cohen. D. Appleton and Company, New York. 1918. pp. xx, 339.

At common law an agreement for arbitration cannot be set up as a bar to an action brought in the ordinary way to determine a dispute which it was agreed to refer, although an action can be maintained for breach of the arbitration agreement; nor will such an agreement be specifically enforced. The parties may, however, make arbitration a condition precedent to any right arising at all. The author contends that these rules are anomalous in theory and unsound in principle. The treatment of the cases is rather bewildering, as they are criticised from the point of view of their accord with the theory of the author and not of their conformity to the established rules above set forth. The argument of the author is not entirely convincing. He fails completely to establish that the jealousy by the courts had anything to do with making the law. It would seem that this is a theoretical explanation invented before the real reasons had been discovered. Later investigation seems to account for most of the anomalies.

(1) Inadequacy of the remedy for arbitration agreements: As it was not until the end of the eighteenth century that a promise for a promise was generally enforced, it is not surprising that arbitration agreements were not binding. The analogy of the power of attorney seems to have been an attempt by the courts to give some effect to an arbitration agreement that under the early law it would not otherwise have had.

(2) Failure to enforce arbitration agreements except by separate action: This is nothing more than the well-known rule of Pordage v. Cole, which makes the various promises in an agreement independent unless expressly made otherwise. The law permits arbitration clauses to be made conditions precedent and in England since 1854 the court has discretion to refuse to entertain an action unless the arbitration clause has been complied with.

(3) Refusal to grant specific performance: Most agreements in English law are not specifically enforced anyway, so the rule as to arbitration is no exception. If a court of equity has to take jurisdiction to compel specific performance of an arbitration agreement it is more in accordance with its general principles to clean up the matter at once by settling the whole controversy.

In other words, arbitration agreements have been treated much like other contracts. Whether, as a matter of policy, the law is wrong and should be changed is questionable. If one of the parties to an arbitration agreement does not want to arbitrate he can put plenty of obstacles in the way. The arbitrators have not the writs, processes and other machinery of

courts to compel a trial, secure the attendance of witnesses and enforce their orders. The experience of many lawyers has been that a submission to arbitration caused many difficulties of its own and ended in a lawsuit anyway. The great success of arbitration in England would seem to depend on several considerations. (1) The parties belong to an organization, like the Incorporated Oil Seed Association, which handles between five and six thousand arbitrations a year. (2) These organizations secure the performance of the arbitration clause by the public opinion in the trade, which would ostracize a man who violated his agreement; also such organizations have powers of suspension or expulsion. There are rules of the stock exchange, for example, which no member can infringe with impunity. (3) In these trades there are a number of men with the knowledge, time and willingness qualifying them to act as arbitrators. (4) The matters in dispute involve the business understanding of the trade rather than general legal principles.

Lacking the above conditions, it is not probable that arbitration can be made a panacea for general disputes. We can agree with the author, however, that arbitration should be encouraged within the groups that have the prerequisites therefor; that litigation should be discouraged and adjustment of disputes facilitated by arbitration and by all other practicable means.

In the appendix will be found some rules for the prevention of unnecessary litigation, being the report of the Joint Committee of the Chamber of Commerce of the State of New York and of the New York State Bar Association.

Mr. Cohen is performing a valuable service in supplying materials for the education of the profession and public in methods of facilitating the settlement of disputes.

A. M. Kidd.

Books Received

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WORKMEN'S COMPENSATION LAWS OF VIRGINIA AND WEST VIRGINIA. By James F. Minor. Michie Co., Charlottesville, Va., 1919. pp. xci, 691.